

1969 Assembly Bill 860

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CHAPTER 427, LAWS OF 1969

AN ACT to repeal 885.36; to amend 885.365 (1); and to create chapter 968 of the statutes, to prohibit electronic surveillance by persons other than law enforcement officers duly authorized by court order and engaged in the investigation or prevention of specific categories of offenses, and providing penalties.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 885.36 of the statutes is repealed.

SECTION 2. 885.365 (1) of the statutes is amended to read:

885.365 (1) Evidence obtained as the result of the use of voice recording equipment for recording of telephone conversations, by way of interception of a communication or in any other manner, shall be totally inadmissible in the courts of this state *in civil action, except as provided in ch. 968.*

SECTION 3. Chapter 968 of the statutes is created to read:

CHAPTER 968.

ELECTRONIC SURVEILLANCE CONTROL.

968.27 DEFINITIONS. As used in this chapter:

(1) "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, microwave or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a public utility in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications.

(2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

(3) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device.

(3m) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facilities, or any component thereof, which is:

1. Furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or

2. Being used by a communications carrier in the ordinary course of its business, or by a law enforcement officer in the ordinary course of his duties.

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(4) "Investigative or law enforcement officer" means any officer of this state or political subdivision thereof, who is empowered by the laws of this state to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

(5) "Contents" when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport or meaning of that communication.

(6) "Aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

(7) "Judge" means the judge sitting at the time an application is made under s. 968.30 or his successor.

968.28 APPLICATION FOR COURT ORDER TO INTERCEPT COMMUNICATIONS. The attorney general together with the district attorney of any county may approve a request of an investigative or law enforcement officer to apply to the circuit court in the county where the interception is to take place for an order authorizing or approving the interception of wire or oral communications. In counties having more than one branch of the circuit court the application shall be made only to the lowest numbered branch having criminal jurisdiction. The judge of such court may under s. 968.30 grant an order authorizing or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense for which the application is made. The authorization shall be permitted only when such interception may provide or has provided evidence of the commission of the offense or murder, kidnapping, commercial gambling, bribery, extortion and dealing in narcotics or dangerous drugs or any conspiracy to commit any of the foregoing offenses.

968.29 AUTHORIZATION FOR DISCLOSURE AND USE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS. (1) Any investigative or law enforcement officer who, by any means authorized by this chapter or 18 USC 119, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer only to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter or 18 USC 119, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents only to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter or 18 USC 119 or by a like statute of any other state, any information concerning a wire or oral communication or evidence derived therefrom intercepted in accordance with this chapter, may disclose the contents of that communication or such derivative evidence only while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, this chapter or 18 USC 119, shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subs. (1) and (2). Such contents and any evidence derived therefrom may be used under sub. (3) when authorized or approved by the judge who acted on the original application where such judge finds on subsequent application, made as soon as practicable but no later than 48 hours, that the contents were otherwise intercepted in accordance with this chapter or 18 USC 119 or by a like statute.

968.30 PROCEDURE FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS. (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to the court and shall state the applicant's authority to make such application and may be upon personal knowledge or information and belief. Each application shall include the following information:

(a) The identity of the investigative or law enforcement officer making the application, and the officers authorizing the application.

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including:

1. Details of the particular offense that has been, is being, or is about to be committed;

2. A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

3. A particular description of the type of communications sought to be intercepted; and

4. The identity of the person, if known, committing the offense and whose communications are to be intercepted.

(c) A full and complete statement whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been obtained, a particular description of facts establishing probable cause to believe that additional communications for the same type will occur thereafter.

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any court for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the court on each such application; and

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The court may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. Oral testimony shall be reduced to writing.

(3) Upon such application the court may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or

oral communications, if the court determines on the basis of the facts submitted by the applicant that all of the following exist:

(a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in s. 968.28.

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception.

(c) Other investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(d) There is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities which, or the place where authority to intercept is granted and the means by which such interceptions shall be made;

(c) A particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(d) The identity of the agency authorized to intercept the communications and of the person authorizing the application; and

(e) The period of time during which such interception is authorized, including a statement whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. Extensions of an order may be granted, but only upon application for an extension made in accordance with sub. (1) and the court making the findings required by sub. (3). The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than 30 days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in 30 days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the court which issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the court requires.

(7) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order or extensions

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thereof all such recordings and records of an intercepted wire or oral communication shall be filed with the court issuing such order and the court shall order the same to be sealed. Custody of the recordings and records shall be wherever the judge handling the application shall order. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be properly kept and preserved for 10 years. Duplicate recordings and other records may be made for use or disclosure pursuant to the provisions for investigations under s. 968.29 (1) and (2). The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under s. 968.29 (3).

(b) Applications made and orders granted under this chapter together with all other papers and records in connection therewith shall be ordered sealed by the court. Custody of the applications, orders and other papers and records shall be wherever the judge shall order. Such applications and orders shall be disclosed only upon a showing of good cause before the judge and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years.

(c) Any violation of this subsection may be punished as contempt of court.

(d) Within a reasonable time but not later than 90 days after the filing of an application for an order of approval under par. (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served on the persons named in the order or the application and such other parties to intercepted communications as the judge determines is in the interest of justice, an inventory which shall include notice of:

1. The fact of the entry of the order or the application.
2. The date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application.
3. The fact that during the period wire or oral communications were or were not intercepted.

(e) The judge may, upon the filing of a motion, make available to such person or his counsel for inspection in the manner provided in s. 18.01 (2) such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to the issuing judge the serving of the inventory required by this subsection may be postponed. The judge shall review such postponement at the end of 60 days and good cause shall be shown prior to further postponement.

(8) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court of this state unless each party, not less than 10 days before the trial, hearing or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This 10-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information 10 days before the trial, hearing or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(9) (a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of this state, or a political subdivision thereof, may move before the trial court or the court granting the original warrant to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that 1) the communication was unlawfully in-

tercepted; 2) the order of authorization or approval under which it was intercepted is insufficient on its face; or 3) the interception was not made in conformity with the order of authorization or approval. Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge may, upon the filing of such motion by the aggrieved person, make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice.

(b) In addition to any other right to appeal, the state shall have the right to appeal:

1. From an order granting a motion to suppress made under par. (a) if the attorney general or district attorney certifies to the judge or other official granting such motion that the appeal is not entered for purposes of delay and shall be diligently prosecuted as in the case of other interlocutory appeals or under such rules as the supreme court adopts; or

2. From an order denying an application for an order of authorization or approval, and such an appeal shall be ex parte and shall be in camera in preference to all other pending appeals in accordance with rules promulgated by the supreme court.

(10) Nothing in this chapter shall be construed to allow the interception of any wire or oral communication between an attorney and a client.

968.31 INTERCEPTION AND DISCLOSURE OF WIRE OR ORAL COMMUNICATIONS PROHIBITED. (1) Except as otherwise specifically provided in ss. 968.28 to 968.30, whoever commits any of the acts enumerated in this section may be fined not more than \$10,000 or imprisoned not more than five years or both:

(a) Intentionally intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept any wire or oral communication;

(b) Intentionally uses, attempts to use or procures any other person to use or attempt to use any electronic, mechanical or other device to intercept any oral communication;

(c) Discloses, or attempts to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this section or under circumstances constituting violation of this section;

(d) Uses, or attempts to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this section or under circumstances constituting violation of this section; or

(e) Intentionally discloses the contents of any oral or wire communication obtained by authority of ss. 968.28, 968.29 and 968.30, except as therein provided.

(f) Intentionally alters any wire or oral communication intercepted on tape wire or other device.

(2) It is not unlawful under this chapter:

(a) For an operator of a switchboard, or an officer, employe or agent of any telephone public utility, whose facilities are used in the transmission of a wire communication to intercept, disclose or use that communi-

cation in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication, but telephone public utilities shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) For a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(c) For a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortuous act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

(d) Any person whose wire or oral communication is intercepted, disclosed or used in violation of this chapter shall 1) have a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose, or use, such communication, and 2) be entitled to recover from any such person:

1. Actual damages, but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;

2. Punitive damages; and

3. A reasonable attorney's fee and other litigation costs reasonably incurred.

(e) A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action brought under this chapter.

(3) Good faith reliance on a court order or on s. 968.30 (7) shall constitute a complete defense to any civil or criminal action brought under this chapter.

968.32 FORFEITURE OF CONTRABAND DEVICES. Any electronic, mechanical, or other intercepting device used in violation of s. 968.31 (1) may be seized as contraband by any peace officer and forfeited to this state in an action by the department of justice under ch. 288.

968.33 REPORTS CONCERNING INTERCEPTED WIRE OR ORAL COMMUNICATIONS. In January of each year, the department of justice shall report to the administrative office of the United States courts such information as is required to be filed by 18 USC 2519. A duplicate copy of such reports shall be filed, at the same time, with the office of administrator of courts under s. 256.54.

SECTION 4. PROGRAM RESPONSIBILITIES, DEPARTMENT OF JUSTICE. Wherever "and 963.04 (8)" appears in section 15.251 (intro.) of the statutes, as affected by chapter 276, laws of 1969, "963.04 (8) and 968.28" is substituted.

SECTION 5. RECONCILIATION WITH CHAPTER , LAWS OF 1969 (Assembly Bill 603). If both this bill and 1969 assembly bill 603 are enacted into law:

(1) The title of chapter 968 of the statutes, created by both bills, shall be "COMMENCEMENT OF CRIMINAL PROCEEDINGS".

(2) The references to "this chapter", appearing in sections 968.27 (intro.) and (5), 968.29 (1), (2), (3), (4) and (5), 968.30 (6), (7) (b) and (9) and 968.31 (2) (intro.) created by this bill, shall be changed to read "ss. 968.28 to 968.34".

Approved February 12, 1970.